(14,799.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 263.

THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF PENNSYLVANIA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 15, 1894.

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1 In the Supreme Court of the United States, October Term, 1891.

NEW YORK, LAKE ERIE & WESTERN RAILROAD COMPANY, Plaintiff in Error, *vs.* COMMONWEALTH OF PENNSYLVANIA. } No. —.

Surwrit of error by the New York, Lake Erie & Western Railroad Company to the supreme court of Pennsylvania.

Assignment of Errors.

I. The learned court erred in not sustaining the company's second exception to the decision of the court of common pleas of Dauphin county, viz:

"The learned court erred in its second conclusion of law, as follows: 'The taxation of such receipts does not offend against art. IX of sec. 1 of the Pennsylvania constitution or against the commercial clause of the Federal Constitution.'"

II. The learned court erred in not sustaining the company's fifth exception to the decision of the court of common pleas of Dauphin county, viz:

"The learned court erred in not finding as a conclusion of law that the attempted taxation of the amount paid to defendant by the canal company under the eighth clause of the agreement as set forth in finding of facts No. 4, particularly the item of $69,100 in respect of coal and merchandise transported by the canal company over the said Jefferson branch in transit to points in other States, the said coal and merchandise when taken upon the cars and upon said Jefferson branch being destined and intended for shipment by continuous transportation upon a single way bill from points in Pennsylvania to points in other States and having been actually so transported to and delivered at points in other States, is in violation of that clause of section 8 of article I of the Constitution of the United States which provides that Congress shall have power 'to regulate commerce with foreign nations and among the several States and with the Indian tribes.'"

2 III. The learned court erred in not sustaining the company's sixth exception to the decision of the court of common pleas of Dauphin county, viz:

"The learned court erred in not finding as a conclusion of law that the taxation of $1,000 received by defendant from the canal company under the sixteenth clause of the agreement in respect of passengers carried interstate by continuous transportation into, out of, or through the State of Pennsylvania, as shown in finding of facts No. 5, is in violation of that clause of section 8 of article I of the Constitution of the United States which confers upon Congress the power 'to regulate commerce with foreign nations and among the several States and with the Indian tribes.'"

IV. The learned court erred in not sustaining the company's seventh exception to the decision of the court of common pleas of Dauphin county, viz:

"The learned court erred in not finding as a conclusion of law that the taxation of the $2,700 received by defendant from the Buffalo, Rochester & Pittsburgh Railway Company for the use of its tracks, the said use being exclusively for purposes of interstate transportation of freight and passengers, is in violation of that clause of section 8 of article I of the Constitution of the United States which confers upon Congress the power 'to regulate commerce with foreign nations and among the several States and with the Indian tribes.'"

V. The learned court erred in affirming the judgment of the court of common pleas of Dauphin county in favor of the Commonwealth of Pennsylvania and against the New York, Lake Erie & Western Railroad Company.

VI. The learned court erred in not reversing the judgment of the court of common pleas of Dauphin county.

To the honorable the judges of the Supreme Court of the United States of America:

Your petitioner prays for a reversal of the judgment
3 entered against it in the supreme court of Pennsylvania for the reasons assigned above.

THE NEW YORK, LAKE ERIE & WESTERN RAILROAD COMPANY,
By its attorney, M. E. OLMSTED.

4 [Endorsed:] In U. S. Supreme Court. New York, Lake Erie and Western Railroad Company (plaintiff in error) *vs.* Commonwealth of Pennsylvania. Assignment of errors. M. E. Olmsted.

5 UNITED STATES OF AMERICA, *ss:*

Seal of the Supreme Court of the United States.

The President of the United States of America to the honorable the judges of the supreme court of the State of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The New York, Lake Erie and Western Railroad Company, plaintiff in error, and The Commonwealth of Pennsylvania, defendant in error, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the de-

cision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or
6 of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said plaintiff in error, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within thirty days from the date hereof, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 22nd day of July, in the year of our Lord one thousand eight hundred and ninety-one.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
JOSEPH P. BRADLEY,
Asso. Justice Sup. C't U. S.

[Endorsed:] Filed in supreme court, middle district, Aug. 6, 1891.

7 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Commonwealth of Pennsylvania, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of State of Pennsylvania, wherein The New York, Lake Erie & Western Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 22nd day of July, in the year of our Lord one thousand eight hundred and ninety-one.

JOSEPH P. BRADLEY,
Asso. Justice Sup. C't U. S.

8 [Endorsed:] New York, Lake Erie & Western Railroad Co. (plaintiff in error) *vs.* Commonwealth of Pennsylvania. Citation. Filed in supreme court, middle district, Aug. 6, 1891.

On this fifth day of August, in the year of our Lord one thousand eight hundred and ninety-one, personally appeared A. C. Stamm before me, the subscriber, prothonotary of the supreme court of Pennsylvania, for the middle district thereof, and makes oath that he delivered a true copy of the within citation to James S. Stranahan, deputy attorney general of the Commonwealth of Pennsylvania.

A. C. STAMM.

Sworn to and subscribed the fifth day of August, A. D. 1891.

[Seal of the Supreme Court of Pennsylvania, Middle District, 1776.]

WILLIAM PEARSON,
Prothonotary Supreme Court of Penna., Middle District.

9 The answer of the justices of the supreme court of the State of Pennsylvania to the writ of error from the Supreme Court of the United States, hereunto annexed, as follows, to wit:

Copy of Appearance Docket Entry.

Among the records and proceedings enrolled in the court of common pleas in and for the county of Dauphin, in the Commonwealth of Pennsylvania, to No. 141, Jan. term, 1890, is contained the following:

In Common Pleas of Dauphin County, Jan. Term, 1890.

COMMONWEALTH OF PENNSYLVANIA
vs.
NEW YORK, LAKE ERIE & WESTERN RAILROAD CO. } No. 141.

Kirkpatrick; Olmsted.

Appeal from settlement by the State treasurer and auditor general.

Docket Entries.

Appeal from the settlement of the auditor general and State treasurer.

Oct. 14, 1889.—Appeal and specifications of objection filed.
Feb'y 7, 1890.—Bond filed.
Feb'y 7, 1890.—*Narr.* and copy of account filed.
March 31, 1890.—Stipulation to try without jury filed.
April 29, 1890.—Stenographer's notes filed, and agreement as to facts.
April 29, 1890.—Opinion and finding of the court filed, deciding that there is due the Commonwealth by the defendant the sum of six hundred forty-three and $\frac{3}{100}$ dollars ($643.03) and costs.
May 27, 1890.—Defendant's exceptions filed.
Same day.—Exceptions overruled and judgment entered in accordance with opinion filed.
June 11, 1890.—Certiorari surappeal No. 7, May T., 1891, from supreme court received and filed.

Judgment of the Court.

This case having been tried without a jury, under the act of April 22, 1874, the court directed judgment to be entered as follows:

Tax	$572 29
Interest at 12 per cent. from November 16, 1889, to April 21, 1889	31 63
Attorney general's commission	29 11
Total	$643 03

10 *Report.*

This report includes the receipts of N. Y., L. E. & W. R. R proper, Hawley Branch R. R., Jefferson R. R., Buffalo, Bradford & Pitts. R. R.

To the auditor general of Pennsylvania:

In accordance with the requirements of the seventh section of an act entitled "An act to provide revenue by taxation," approved June 7, 1879, as treasurer of the New York, Lake Erie and Western Railroad Company, I make the following report of the gross receipts of said company for the six months ended June 30th, 1889.

(Signed) EDWARD WHITE, *Treasurer.*

Office of the treasurer New York, Lake Erie and Western Railroad Company.

21 CORTLANDT ST., NEW YORK, *August* —, 1889.

Gross receipts derived from all sources		$9,281,389 44
Gross receipts from traffic or business done wholly within the State		118,030 11
That is to say:		
From tolls and transportation (not including U. S. mails)	$40,695 17	
From transportation of U. S. mails	1,103 85	
From telegraph business		
From telephone business		
From express business (Wells, Fargo & Co.)	2,068 98	
From transportation of coal mined, purchased, or sold		
From all other sources (see marginal note)	74,162 11	
Total receipts within the State		$118,030 11

Marginal Note.

This item includes—

$71,462 11	received from the Delaware & Hudson Canal Co., as rental for the use of the tracks of the Jefferson R. R.; and
2,700 00	received from the Buffalo, Rochester & Pittsburg R'y Co., as rental for the use of the tracks of the Buffalo, Bradford & Pitts. R. R.
$74,162 11	

STATE OF NEW YORK, }
City and County of New York, } *ss:*

On this 20th day of August, A. D. 1889, personally appeared before me, a notary public in and for the county and State aforesaid, Edward White, treasurer of the New York, Lake Erie and 11 Western Railroad Company, who, being duly sworn according to law, did depose and say that the foregoing report is true and correct, and that the company has accounted for and returns herewith gross receipts for transportation of coal mined, purchased, or sold, at the same rates as are charged for the transportation of similar freight for other companies or individuals.

(Signed) EDWARD WHITE, *Treasurer.*

Sworn and subscribed before me, the day and year aforesaid.

[SEAL.] (Signed) CHAS. STEELE,
Notary Public (95), *New York County.*

Account.

New York, Lake Erie and Western R. R. Company in account with the Commonwealth of Pennsylvania, Dr.

For tax on gross receipts per act of June 7th, 1879, for six months ending June 30, 1889, as per reports herewith filed:

Gross receipts.....	$116,926 26
Tax at rate of eight-tenths of one per cent.....	$935 41
Due Commonwealth	$935 41

AUDITOR GENERAL'S DEPARTMENT,
HARRISBURG, *September* 12, 1889.

Settled and entered.
(Signed) JNO. A. GLENN,
For THOMAS McCAMANT,
Auditor General.

TREASURY DEPARTMENT OF PA.,
HARRISBURG, *September* 17, 1889.

Approved.
(Signed) WM. LIVSEY,
For WM. B. HART,
State Treasurer.

12 AUDITOR GENERAL'S DEPARTMENT,
HARRISBURG, *September* 18, 1889.

I hereby certify, that the above is a true copy of the original remaining on file in this department.

Witness my hand and seal of office, the day and year aforesaid.

(Signed) JOHN A. GLENN,
[SEAL.] For THOMAS McCAMANT,
Auditor General.

Appeal.

In the matter of the account for tax on gross receipts for the six months ending June 30, 1889, amounting to $935.41, settled against the New York, Lake Erie and Western Railroad Company by the auditor general of Pennsylvania September 12, 1889, and approved by the State treasurer September 17, 1889, a copy of which account is hereunto attached.

The said New York, Lake Erie and Western Railroad Company having paid or proposing to pay into the State treasury the sum of $342.11, being the tax, at eight mills, upon the company's receipts from tolls and transportation and from express business, hereby appeals from said settlement of account to the court of common pleas of Dauphin county, and files the following specifications of objections thereto, agreeably to the provisions of the act of assembly in such case made and provided.

1. The report made by the treasurer of the corporation appellant included the receipts of the New York, Lake Erie and Western Railroad Company, proper, and also the receipts of the Hawley Branch railroad, the Jefferson railroad, and the Buffalo, Bradford and Pittsburg railroad. The account hereby appealed from includes tax to the amount of $571.70 upon $71,462.11, receipts derived from the Delaware and Hudson Canal Company as rental for the use of the tracks of the Jefferson Railroad Company. Said tax is improperly and illegally charged, because the seventh section of the act
13 of June 7th, 1879, under which said tax is claimed, imposes tax only upon receipts "for tolls and transportation, telegraph business, or express business."

2. The account hereby appealed from includes tax to the amount of $21.60, upon $2,700, receipts derived from the Buffalo, Rochester and Pittsburg Railway Company, as rental for the use of the tracks of the Buffalo, Bradford and Pittsburg Railroad Company. Said tax is improperly and illegally charged, because the seventh section of the act of June 7th, 1879, under which said tax is claimed imposes tax only upon receipts "for tolls and transportation, telegraph business, or express business."

3. The Delaware and Hudson Canal Company has paid, or is liable to pay, a tax upon that portion of the receipts derived from transportation wholly within the State of Pennsylvania, over the tracks of the Jefferson Railroad Company, and if the seventh section of the act of June 7, 1879, or any other act of assembly, can be construed to impose upon the corporation appellant an additional

tax in respect of receipts derived as rental from the Delaware and Hudson Canal Company, for the use of the tracks of the Jefferson Railroad Company, then said act is unconstitutional and void, because in conflict with section one of article IX, of the constitution of Pennsylvania, which requires that "all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax."

4. The Buffalo, Rochester and Pittsburg Railway Company has paid, or is liable to pay, a tax upon that portion of its receipts derived from transportation wholly within the State of Pennsylvania, over the tracks of the Buffalo, Bradford and Pittsburg Railroad Company, and if the seventh section of the act of June 7, 1879, or any other act of assembly, can be construed to impose upon the corporation appellant an additional tax in respect of receipts derived as rental from the Buffalo, Rochester and Pittsburg Railway Company, for the use of the tracks of the Buffalo, Bradford and Pittsburg Railroad Company, then said act is unconstitutional and void, because in conflict with section 1, of article IX, of the constitution of Pennsylvania, which requires that "all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax."

14 5. The taxation of the receipts of the corporation appellant derived as rental from the Delaware and Hudson Canal Company for the use of the tracks of the Jefferson Railroad Company, would result in double taxation, which is not warranted by the act of June 7, 1879, or any other act of assembly, and which is never to be presumed in the absence of express authority of law.

6. The taxation of the receipts of the corporation appellant derived as rental from the Buffalo, Rochester and Pittsburg Railway Company for the use of the tracks of the Buffalo, Bradford and Pittsburg Railroad Company, would result in double taxation, which is not warranted by the act of June 7, 1879, or any other act of assembly, and which is never to be presumed in the absence of express authority of law.

7. The business conducted by the Delaware and Hudson Canal Company over the tracks of the Jefferson Railroad Company and for which $71,462.11 was paid by the said canal company, consisted almost exclusively of the transportation of freight and passengers from points in other States to points in Pennsylvania, or from points in Pennsylvania to points in other States, or from points in other States to points in other States, passing through Pennsylvania. The taxation of the receipts of the corporation appellant derived from the rental of its tracks to the Jefferson Railroad Company for conducting such interstate business would be an interference with interstate commerce, and, as such, would be in conflict with that clause of section 8 of article I of the Constitution of the United States, which provides that Congress shall have power "to regulate commerce with foreign nations and among the several States and with the Indian tribes;" and the act of June 7, 1879, under which said tax is claimed, or any other act of assembly, if it

shall be found to warrant the imposition of such tax, is, therefore, unconstitutional and void.

8. The business conducted by the Buffalo, Rochester and Pittsburg Railway Company over the tracks of the Buffalo, Bradford and Pittsburg Railroad Company, and for which $2,700 rental was paid by the said Buffalo, Rochester and Pittsburg Railway Company, consisted almost exclusively of the transportation of freight and passengers from points in other States to points in Pennsylvania, or from points in Pennsylvania to points in other States, or from points in other States to points in other States, passing through Pennsylvania. The taxation of the receipts of the corporation appellant derived from the rental of the tracks of the Buffalo, Bradford and Pittsburg Railway Company for conducting such interstate business would be an interference with interstate commerce, and as such would be in conflict with that clause of section 8 of article 1 of the Constitution of the United States, which provides that Congress shall have power "to regulate commerce with foreign nations and among the several States and with the Indian tribes;" and the act of June 7, 1879, under which said tax is claimed, or any other act of assembly, if it shall be found to warrant the imposition of said tax, is, therefore, unconstitutional and void.

9. The New York, Lake Erie and Western Railroad Company, having paid or proposing to pay into the State treasury the sum of $342.11, being the full tax at eight mills upon the company's receipts from tolls and transportation and from express business, it is not indebted to the Commonwealth in any further sum, and the balance claimed in the settlement hereby appealed from is erroneously and illegally charged.

Harrisburg, Pa., October 5, 1889.

NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY,

(Signed) By its attorney, M. E. OLMSTED.

Endorsed: No. 141, Jan. term, 1890. Commonwealth of Pennsylvania *vs.* New York, Lake Erie and Western Railroad Co. Appeal from the settlement of an account by the auditor general and State treasurer. Filed in the auditor general's office the 9th day of October, 1889. (Signed) Jno. A. Glenn for Thomas McCamant, auditor general. Filed in the prothonotary's office the 14th day of Oct., 1889. —— ——, prothonotary. M. E. Olmsted, attorney for defendant.

Know all men by these presents that we, the New York, Lake Erie & Western R. R. Company and American Surety Company of New York, are held and firmly bound unto the Commonwealth of Pennsylvania in the sum of eleven hundred eighty-six & $\frac{60}{100}$ dollars ($1,186.60), lawful money of the United States of America, to be paid to the said Commonwealth of Pennsylvania or her certain attorney or assigns; to which payment, well and truly

to be made, we do bind ourselves and each of us, our heirs, executors, administrators, and successors, firmly by these presents.

Sealed with our seals and the corporate seal of said company and dated the 5th day of February, A. D. 1890.

Whereas the above-bounden New York, Lake Erie & Western R. R. Company has entered in the office of the auditor general of Pennsylvania an appeal to the court of common pleas of Dauphin county from the settlement of an account for tax on gross receipts amounting to nine hundred and thirty-five and $\frac{41}{100}$ dollars ($935.41), made by the auditor general on the — day of —— and approved by the State treasurer on the 12 day of September, 1889, upon which three hundred forty two & $\frac{11}{100}$ dollars have been paid into the State treasury:

Now, the condition of this obligation is such that if the said New York, Lake Erie & Western R. R. Company shall prosecute its said appeal with effect and pay all costs or charges which the court or arbitrators having jurisdiction to hear and determine said appeal shall award, and also pay any sum of money which shall appear by the judgment of the court or award of arbitrators to be due upon said account to the Commonwealth of Pennsylvania, then this obligation to be void and of none effect, or otherwise to be and remain in full force and virtue.

NEW YORK, LAKE ERIE & WESTERN
R. R. COMPANY,
By JOHN KING, *President.*

Attest:
[Seal of N. Y., L. E. & W. R. R.]
A. R. MACDONOUGH, *Secretary.*

AMERICAN SURETY CO.,
By DAVID B. SICKELS, *Vice-president.* [SEAL.]
WYLLUS BENEDICT, [SEAL.]
Assistant Secretary.

Signed, sealed, and delivered in presence of—
H. G. HINTON.

The security of the above bond is approved.
(Must be signed by a judge of some court in county where sureties reside.)

SIMON M. EHRLIE,
Justice of the City Court of New York.

Feb. 6, 1890.—The security of the within bond approved by the court.

J. W. SIMONTON, *P. J.*

17 *Narr.*

In Dauphin Common Pleas.

No. 141, Jan. Term, 1890.

DAUPHIN COUNTY, *ss:*

The Commonwealth of Pennsylvania, by her attorney general, complains of the New York, Lake Erie and Western Railroad Company of a plea that they render unto the said Commonwealth the sum of one hundred thousand dollars, lawful money of the United States, which they owe to and unjustly detain from her, for that whereas the said defendants, on the 17th day of September, A. D. 1889, at the county of Dauphin aforesaid, were indebted to the said plaintiff in the sum of nine hundred and thirty-five $\frac{41}{100}$ dollars, lawful money of the United States, on an account examined, adjusted, settled and signed by the auditor general and State treasurer of this Commonwealth and duly entered in the books of their respective offices, as authorized and required by law, on the day and year last aforesaid, in which a certain sum of money, to wit, the sum last aforesaid, is due and owing the said plaintiff from the said defendants, with interest thereon, at the rate of twelve per centum per annum, from and after the expiration of sixty days from the day upon which the said account was so as aforesaid examined, adjusted, settled, and signed by the auditor general and State treasurer of this Commonwealth, for tax on gross receipts, per act of June 7th, 1879, for six months ending June 30th, 1889, a copy of which said account was thereafter sent by the said auditor general, under his hand and seal of office, to the said defendants, and which yet remains in full force against the said defendants and — appealed from; whereby, and by force of the statute in such case made and provided, an action hath accrued to the said plaintiff to demand and have of and from the said defendants a certain sum of money, to wit, the sum mentioned and ascertained to be due to this Commonwealth in the said account so as aforesaid examined, adjusted, settled, and signed by the auditor general and State treasurer of this Commonwealth, parcel of the said sum above demanded, with interest and other legal charges, and, being so indebted, the said defendants afterwards, to wit, on the day and year aforesaid, at the county aforesaid, promised to pay to the said plaintiff, on request, the said last-mentioned sum of money.

And whereas, also, the said defendants, on the day and year in the first count first mentioned, at the county aforesaid, were indebted to the said plaintiff in a certain further sum of money, to wit, the sum mentioned and ascertained to be due to this Commonwealth in the said account in the first count mentioned, for money then and there had and received by the said defendants to and for the use
18 of the said plaintiff, and also a certain further sum of money, to wit, the sum last aforesaid, on an account settled and entered by the auditor general and State treasurer of this Commonwealth

against the said defendants, on the day and year in the first count mentioned, for tax on gross receipts;

And whereas afterwards, to wit, on the day and year last aforesaid, at the county aforesaid, the said defendants, in consideration of the premises, promised to pay the two last-mentioned several sums of money respectively to the said plaintiff on request: Yet the said defendants have disregarded their said promises and, although often requested so to do, have not as yet paid any of the said several sums of money or any part thereof, to the damage of the said plaintiff of one hundred thousand dollars; and therefore she brings suit, &c.

JOHN F. SANDERSON,
Deputy Attorney General.

19 New York, Lake Erie and Western Railroad Co. in account with the Commonwealth of Pennsylvania, Dr.

For tax on gross receipts per act of June 7th, 1879, for six months ending June 30, 1889, as per report herewith filed:

Gross receipts.....	$116,926 26	
Tax at rate of eight-tenths of one per cent.....		$935 41
Due Commonwealth.....		$935 41

Interest at 12 per centum from 60 days after date of settlement; remit to State treasurer.

AUDITOR GENERAL'S DEPARTMENT,
HARRISBURG, PA., *Sept. 12th*, 1889.

Settled and entered.

JOHN A. GLENN,
For THOS. McCAMANT,
Auditor General.

TREASURY DEPARTMENT OF PA.,
HARRISBURG, PA., *Sept. 17th*, 1889.

Approved.

WM. LIVISEY,
For WM. B. HART,
State Treasurer.

AUDITOR GENERAL'S DEPARTMENT,
HARRISBURG, *Oct.* 10, 1889.

I hereby certify that the above is a true copy of the original remaining on file in this department.

Witness my hand and the seal of office the day and year aforesaid.

JOHN A. GLENN,
For THOMAS McCAMANT,
Auditor General.

[Seal of the Auditor General.]

20 *Stipulation to Try Without Jury.*

In the Court of Common Pleas of Dauphin County, January Term, 1890.

COMMONWEALTH OF PENNSYLVANIA
vs.
NEW YORK, LAKE ERIE AND WESTERN R. R. Co. } No. 141.

It is hereby agreed that a trial by jury be dispensed with in the above-stated case, and that the same be submitted to the decision of the court to be heard and determined under the provisions of an act entitled "An act to provide for the submission of civil cases to the decision of the court, and to dispense with trial by jury," approved the 22d day of April, 1874, subject, however, to a writ of error as in other cases, at the option of either party.

(Signed) JOHN F. SANDERSON,
Deputy Attorney General.

(Signed) M. E. OLMSTED,
Attorney for Defendant.

March 31, 1890.

Endorsed: No. 141, Jan. term, 1890. Commonwealth *vs.* New York, Lake Erie and Western R. R. Co. Stipulation to try without jury. Filed March 31, 1890.

21 (EXHIBIT No. 1.)

Agreement as to Facts.

In the Court of Common Pleas of Dauphin County, January Term, 1890.

COMMONWEALTH OF PENNSYLVANIA
vs.
NEW YORK, LAKE ERIE & WESTERN RAILROAD COMPANY. } No. 141.

And now, to wit, March 31, 1890, it is agreed that the facts hereinafter stated shall be treated with like effect as if the same had been proven in court, upon the trial of the case, subject to all objections by the Commonwealth as to the relevancy and materiality of the said facts, or any of them, under the exceptions and pleadings in the case.

The New York, Lake Erie and Western Railroad Company, defendant, is a corporation of the State of New York, owning and operating a main line of railroad extending from Jersey City, in the State of New Jersey, to Dunkirk, New York, a distance of about four hundred and fifty-nine (459) miles, of which about forty-two (42) miles are in Pennsylvania, and the balance in New York and New Jersey. It also leases and operates certain branch railroads,

in the different States, including what is known as the Jefferson branch, extending from Carbondale, Lackawanna county, Pennsylvania, to a point of connection with the main line, in the county of Susquehanna, Pennsylvania. At Carbondale the Jefferson branch connects with the railroad of the Delaware and Hudson Canal Company, which last-mentioned company is engaged in mining, and also in transporting, coal.

The Delaware and Hudson Canal Company makes use of the Jefferson branch of the defendant's railroad in the manner, for the purposes, and upon the terms, specified in an agreement, a copy of which is made part hereof, hereto attached, and marked "Exhibit A." The amount paid by the Delaware and Hudson Canal Company to defendant for transportation of coal and merchandise, under the eighth clause of said agreement, for the six months ending June 30, 1889, was $69,462.11. Of the said amount $69,100 was in respect of coal and merchandise transported by the Delaware and Hudson Canal Company over the said Jefferson branch, in transit to
22 points in other States, the said coal and merchandise, when taken into the cars and upon the said Jefferson branch, being destined and intended for shipment by continuous transportation, upon a single way bill from points in Pennsylvania to points in other States, and having been actually so transported to, and delivered at, points in other States; and $362.11 was paid in respect of coal and merchandise taken up and put down within the State of Pennsylvania. The Delaware and Hudson Canal Company has paid into the State treasury of Pennsylvania a tax upon its entire receipts for the transportation of coal and merchandise in respect of which it paid to the defendant the said sum of $362.11.

The amount paid to the defendant by the canal company, under the sixteenth clause of the said agreement, was $2,000, of which $1,000 was made up of half fares collected from local passengers taken up and put down within the State of Pennsylvania; and $1,000 was in respect of passengers carried interstate, by continuous transportation, into, out of, or through, the State of Pennsylvania.

The defendant leases and operates also what is known as the Buffalo, Bradford and Pittsburgh branch, extending from Buttesville, or Gilesville, Pennsylvania, to a connection with the main line at Carrollton, New York, a portion of which is used by the Rochester & Pittsburgh Railroad Company, (now Buffalo, Rochester & Pittsburgh Railway Company,) under an agreement, of which a copy is hereto attached, made part hereof, and marked (Exhibit B), Crawford Junction mentioned in said agreement being in the State of New York, and the point about twenty-five hundred feet northerly of Howard's crossing, therein mentioned, being in the State of Pennsylvania. The amount paid by the Buffalo, Rochester & Pittsburgh Railway Company to the defendant, under the above contract, for and during the six months ending June 30, 1889, was $2,700, being one semi-annual payment.

The Buffalo, Rochester & Pittsburgh Railroad Company has paid into the State treasury the tax upon its receipts for the six months

ending June 30, 1889, so far as derived from transportation between points both of which are within the State of Pennsylvania.

Upon the tenth day of February, 1890, defendant paid into
23 the State treasury, on account of tax on gross receipts for the six months ending June 30, 1889, the sum of $342.11.

(Signed) W. S. KIRKPATRICK,
Attorney General.

(Signed) M. E. OLMSTED,
Attorney for Defendant.

EXHIBIT A.

This contract and agreement, made and entered into this seventh day of April, A. D. 1885, by and between the president, managers, and company of the Delaware and Hudson Canal Company, a corporation created and existing under the laws of the State of New York, hereinafter called "the canal company," and the New York, Lake Erie and Western Railroad Company, a corporation created and existing under the laws of said State, hereinafter called "the railroad company," witnesseth as follows:

First. The canal company agrees to give to the railroad company the transportation of all its coal, except that which it may ship by its own canal and railroads, destined to any and all points reached by the New York, Lake Erie and Western railroad or its connections, excepting that the canal company reserves the right to sell at breakers or ship by other railroads from territory south of Mill creek, not to exceed two hundred thousand tons of coal in any one year, and reserves also the right, at its option, to ship coal via Oswego to points on Lake Ontario, not reached by the railroad company or its connections. And it is further understood and agreed that the canal company, in addition to the foregoing reservations, may ship not exceeding twenty thousand tons of coal annually from Oswego to western points reached through the Welland canal, whenever it may become desirable to do so on account of facilities for the procurement of light-draught vessels.

All canal Co.'s coal not sent by i s own lines to be shipped over R. R.

Exceptions.

Second. In consideration of the canal company's shipping all its coal it may sell east of Honesdale, Pennsylvania, and at tide water,
24 in excess of amount transported upon its canal, the railroad company will transport said coal from Honesdale to Weehawken, on the Hudson river, in the State of New Jersey, at fifty per cent. of the selling price per ton for all coal sold and delivered free on board at Weehawken,

Rates to be charged by R. R.

Computation and division thereof.

which fifty per cent. shall cover and be the entire freight charge from mines to foot of trestle at Weehawken, and from this fifty per cent. shall be deducted nine cents per ton for the use of the property of the Hoboken Land and Improvement Company, and the remainder shall be divided as follows, viz: Twenty-seven per cent. to be retained by the canal company as freight charge from the mines to Honesdale and for transferring and handling at that point. For example, coal that averages $4 per ton, fifty per centum is $2; deduct for Hoboken Land and Improvement Company nine cents, leaving a balance of $1.91; 73 per cent. of this amount is 1.39\frac{43}{100}$ths; add to this the charge of the Hokoken Land and Improvement Company, nine cents, makes 1.48\frac{43}{100}$, which is the rate to be paid by the canal company and received by the railroad company, and in that proportion, whatever the price of coal may be.

Example.

Full invoice price the basis

Third. The selling price of coal on which freight charge is based shall be the actual or invoice price of the canal company for the time being, without deducting commissions, expense of handling, accounting or any other expense.

as at Weehawken only.

Fourth. The only point at which rates of transportation are made, based upon the selling price of coal, shall be at the docks at Weehawken aforesaid, except as hereinafter provided, or from time to time agreed upon.

R. R. Co. pays canal Co. at rate of $50,000 on 300,000 tons a year—for transfer, etc., at Weehawken.

Fifth. In consideration of the canal company's furnishing and maintaining docks at Weehawken and the transferring and handling of coal thereat, at its own cost and expense, the railroad company agrees to pay to the canal company fifty thousand dollars per annum, based upon a yearly business of 300,000 gross tons; this amount to be increased or diminished in the same proportion as the tonnage increases or diminishes, and to be adjusted and paid monthly.

Anthracite rates to other points to be fixed by Co's. Each to allow the other lowest rates given by any other carrier.

Sixth. Rates on anthracite coal to other points than those hereinbefore specified shall be fixed from time to time by the proper officers of the two companies, and the railroad company hereby agrees that such rates shall be as low as those given by it to any other shipper or party, and as low as the rate that may be given to any shipper or party by any other railroad company at competitive points. It being further understood that the canal company shall give the railroad company on business destined to

points south of Carbondale as low rates as are given to any other party shipping over its railroad, and on competitive business shall make rates as low as any given to any shipper or party by any other railroad company.

Constructive mileage allowance to canal Co. fixed—40 m.

Seventh. On all business to, and from all points south of, Carbondale, to and including Mill creek and Plymouth Junction, the canal company shall receive in a division of rates an allowance of 40 miles, with the exception that on business originating and terminating between Carbondale and Erie and Edgerton breakers the present rates per ton (viz: 3 cents per mile) shall continue in force until abrogated by further agreement between the parties, it being the understanding that in case of the construction of new breakers, or of the development of new businesss, the railroad company may ask a readjustment of the rates now in force as applicable to such new and additional business. The constructive mileage provided for in this paragraph shall apply on business to and beyond Buffalo, suspension and international bridges, Dunkirk, Salamanca, and intermediate local points; except for Owego, for southern central railroad points, Elmira for local purposes, and for Elmira, Cortland, and northern railroad points, where the allowance for constructive distance shall be 35 miles instead of 40. This provision shall not affect existing arrangements between the parties in regard to the Green Ridge route.

May be readjusted on new business.

35 m.

Canal Co. pays R. R. Co. trackage on Jeff. R. R.

Eighth. The canal company shall pay to the railroad company trackage on the Jefferson Branch of the New York, Lake Erie and Western railroad to the amount of one-fourth of one cent per ton per mile; but the total amount in any one year shall not be less than $120,000, and the same shall be payable monthly.

26

Ton weight defined.

Ninth. The weight of a ton in this agreement is to be considered to mean 2,240 pounds when applied to anthracite coal, iron and steel rails and blooms, iron ore and pig-iron. On all other freight a ton shall be counted 2,000 pounds.

Tenth. In consideration of the canal company's furnishing and maintaining a yard at Carbondale for the use of the respective parties jointly, the railroad company shall pay to the canal company for rental $4,000 per annum, payable monthly.

R. R. Co. pays canal Co. rent of Carbondale yard $4,000.

Jefferson R. R. repairs and side tracks provided for.

Eleventh. The railroad company agrees to put the road-bed and track of its Jefferson branch in good and safe working order during the present

season as soon as the weather will permit, and also, as soon as practicable, on account of weather, to construct two miles of additional sidings, so that freight trains shall readily move on an average over said line in not exceeding three hours and a half, each way, for the whole distance—accidents and delays not caused by the fault of the railroad company excepted. It is also understood and agreed that such further side-track facilities and double tracks shall be constructed as from time to time the business may require.

and double track.

Lateral charge by canal Co. to certain shippers.

Twelfth. The canal company may, at its option, collect from shippers five cents lateral charge on all coal shipped from below Scranton, which lateral charge shall be in addition to the established through rates.

Transfer charges at Carbondale.

Thirteenth. The railroad company agrees to pay to the canal company five and one-half cents per ton for transfer at Carbondale from gravity cars to standard-guage cars on coal actually transferred. This amount never to exceed in any one year eight per cent. of the total amount of coal delivered to the railroad company for transportation north from Carbondale.

Each party liable for usual acre.

Fourteenth. Under this agreement, each of the parties shall be liable to the other and to the public for the exercise of that care and diligence which is ordinarily observed on well-managed railroads; and in case of any damage incurred or sustained by the default or miscarriage of either party, or its officers, agents or employees, the rights and liabilities of the parties shall be decided in accordance with this rule, and not otherwise.

27

On accident R. R. Co. to clear track.

In case of accident the railroad company shall clear the track; and the expenses thereof, and all damages arising therefrom, shall be borne by the party responsible therefor, in accordance with the general rule above established.

Party running trains takes risk when in the other's stations, etc.

Engines, cars, and the property carried in the cars of either party, while standing on the sidings, or in the station or engine-houses of the other, shall be at the risk of the party running the trains in which the same are or were contained.

Weighing to be done by party having facilities under the other's inspection.

Fifteenth. In order to arrive at the tonnage transported under this agreement, all coal shall be accurately weighed by the company at present having the facilities, and such weights shall in each case be subject to the inspection of the representative of the company not weighing, should it desire at any time to make such inspection or ex-

amination. In order to fully carry out this provision cars shall be light weighed every three months, when practicable, excepting at points where they are light weighed each trip before being loaded. No allowance for wastage shall be made on coal carried in box cars, and only such allowance on that in open cars as may be determined after careful investigation; and no claim or allowance shall be made for deficiency of weight of pea or buckwheat coal, unless the car has been transferred, damaged, or unreasonably delayed on the way. It is understood and agreed that the railroad company is to keep the cars that are from time to time furnished to the canal company in reasonable good order and condition for transportation of those sizes; but the canal company is not to suffer any loss of weight arising from causes outside and beyond its control by reason of defective cars and accidents, for which the railroad company is responsible.

Cars to be light weighed every 3 mos.

Allowance for wastage or deficiency of weight.

Sixteenth. It is further covenanted and agreed that the canal company shall have, during
28 the continuance of this agreement, the right and privilege of running through passenger trains over and upon the Jefferson branch of the railroad company, connecting thereby and therewith the canal company's railroads situate between Scranton and Carbondale, and in Susquehanna county, with its said canal company's railroad, called the Lackawanna and Susquehanna railroad, in the State of New York, and with the Albany and Susquehanna railroad and the Rennselaer and Saratoga railroad—which through trains are to have all the rights and privileges upon said railroad, as to time-tables, use of road, etc., enjoyed by or accorded to first-class express passenger trains; provided, however, that if passengers are taken thereon or delivered at any way stations on the line of said Jefferson branch, the canal company shall pay to the railroad company one-half of the fares collected from such local passengers. And the canal company is to pay the railroad company as compensation for other passengers one cent per mile per revenue passenger, except in case excursion trains are run, when the railroad company shall be paid one-half the gross fares per mile received from such passengers or such trains, and one-half the revenue from express and mails, based on the earnings per train mile.

Canal Co. may run passenger trains over Jeff. R. R.

Regulations as to rights and rates.

Settlements under this contract.

Seventeenth. It is further understood that all payments due under this agreement shall be made in the city of New York, not later than the tenth of each month, for the business of the preceding month.

Taxes, how paid U. S. Gov't.

Eighteenth. It is further understood and agreed that in case of imposition by the United States Government of any tax, impost or excise, for or in respect of coal, the said canal company shall, in respect of the coal transported under this contract, bear such tax, impost, or excise, and indemnify the railroad company against the same, but the railroad company shall itself bear and pay any tax which may be imposed upon its freights or earnings derived from the transportation of coal hereunder. And in case any charge or tax shall hereafter be imposed upon the coal by authority of either of the States in which the same is to be transported under this agreement, the canal company shall bear and pay such tax or charge, and indemnify the railroad company against the same.

State governments.

29

Inspection by R. R. auditor of canal Co.'s books.

Nin-teenth. The canal company agrees to give the auditor of the railroad company, or any other properly designated officer or agent, access to the audit offices of the canal company at all reasonable times, for an inspection of all books, returns, accounts, statements, vouchers, or other documents, papers, or other data, upon which the statements of the tonnage, passengers carried, or sales prices of coal are based, or by which they are affected, and any other information necessary to insure the proper observance of this agreement. It is hereby expressly understood and agreed that the said auditing officer or agent of the railroad company shall not make use of the said or other examinations or accountings for any purpose other than those specified, and any improper use by him of information so, or otherwise, obtained, shall, upon the requirement of the canal company to that effect, cause him to be permanently withdrawn by the railroad company from any and all such duties or relations. It is hereby expressly understood and agreed that the canal company shall have like privileges in respect of making inspection or examination of the books, returns, accounts, statements, vouchers, or other documents, papers, or other data of the business of the railroad company, pertaining to this contract, under like restrictions.

Restriction.

The like by canal Co.

Twentieth. Should any difference arise between the parties hereto as to the true meaning, effect, or construction of any part of this contract, or as to any matter arising hereunder, the same shall be referred to the arbitration of one person to be selected by the parties hereto; and in the event of their not being able to agree upon one person as arbitrator, each party shall select an arbitrator, to whom such matter of difference shall be referred; and in the event of their disagreement the two arbitrators so selected may select an umpire, and the award of the single arbitrator, if one should be selected by the consent of both parties, or of one and the umpire, in case two arbitrators are chosen, shall be and become, in all respects, binding upon the parties hereto.

Arbitration clause.

Twenty-first. This contract and agreement is to continue in force for a period of five years, beginning on the day and year first hereinabove written; subject, however, to the right of either party to give two years' notice in writing of its intention to terminate this contract and agreement. And upon the expiration of two years after such notice has been given, the same shall be terminated for all purposes.

Term, 5 yrs., to Apr 7, 1890; may end on 2 yrs.' written notice.

In witness whereof, the parties hereto have affixed their respective corporate seals hereunto, and caused this instrument to be subscribed by their respective presidents and secretaries.

THE PRESIDENT, MANAGERS, AND COMPANY OF THE DELAWARE AND HUDSON CANAL COMPANY,
By R. M. OLYPHANT, *Pres't.*
[Seal D. & H. C. Co.]
Attest: F. M. OLYPHANT, *Secretary.*

THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY,
By JOHN KING, *Pres't.*
[Seal N. Y., L. E. & W. R. R. Co.]
Attest: A. R. MACDONOUGH, *Secretary.*

31 EXHIBIT B.

This contract, made this twentieth day of October, A. D. 1882, between the New York, Lake Erie and Western Railroad Company, party of the first part, and the Rochester and Pittsburgh Railroad Company, party of the second part, witnesseth:

Whereas, the party of the first part is the lessee of the railroad of the Buffalo, Bradford and Pittsburgh Railroad Company, extending from Alton, in the State of Pennsylvania, northerly to a connection with the railroad of said first party at Carrollton;

And whereas, the party of the second part is engaged in the construction of a railroad from Rochester, in the State of New York, to Punxsutawney, in the State of Pennsylvania, and desires to use that portion of the railroad of the Buffalo, Bradford and Pittsburgh Railroad Company aforesaid, between Crawford Junction and a point about 2,500 feet northerly of Howard's crossing, as a portion of its own line of road in the manner hereinafter provided.

Now, in consideration of the premises, the party of the first part hereby gives and grants unto the party of the second part the right of trackage over that portion of said Buffalo, Bradford and Pittsburgh railroad, between Crawford Junction and the point about 2,500 feet northerly of Howard's crossing aforesaid, for the transportation of coal, freights, passengers, express, and mails, at its own expense, together with the privilege of using the sidings, switches, water, water stations, turnouts, turn-tables and depots upon said railroad within the limits aforesaid to such extent as shall be reasonably required for the business of the party of the second part thereon under this contract; subject, however, to all such reasonable rules and regulations as the said party of the first part may from time to time prescribe with reference thereto.

In consideration thereof, the party of the second part hereby agrees to pay the party of the first part in compensation for the rights and privileges granted as aforesaid, as follows:

1st. The sum of five thousand four hundred dollars per annum, payable semi-annually.

2d. An amount per annum equal to six per centum upon one-half of the cost of all additions and betterments made to and
32 upon the portion of said railroad, between Crawford Junction and the point about 2,500 feet northerly of Howard's crossing aforesaid, during the continuance of this contract, the same to be ascertained and paid semi-annually.

3d. A proportion of the annual cost of the maintenance of the portion of said railroad aforesaid, of the care and management thereof, and of all taxes and insurances paid thereon, to be ascertained upon the basis of the comparative wheelage over the same by the parties of the first and second parts hereto, such proportion to be ascertained and paid monthly

All expenses of renewing and reconstructing the bridges, station-houses, superstructure, and other portions of said railroad, when

destroyed or injured by fire or otherwise, shall be deemed and treated as part of cost of maintenance hereunder.

It is expressly understood and agreed that the party of the first part is to put the railroad over which the trackage right is given hereunder, in good order and condition by renewing the ties and relaying the present rails with steel.

Accurate accounts shall be kept by the party of the first part of its own trackage and of the trackage of the party of the second part hereunder, as well as of all expenditures in and about the maintenance, care, and management of the railroad, to which accounts the party of the second part shall have access at all reasonable times for the purpose of verification, and payment of the amount found to be due from the party of the second part to the party of the first part shall be made accordingly.

It is agreed that the following general rules and regulations shall govern the party of the second part in the enjoyment of the privileges hereunder.

First. Trains of the party of the second part shall have equal rights and privileges, and shall be subject to like conditions and restrictions as trains of the same class of the party of the first part.

Second. The party of the second part shall be responsible, while upon the railroad of the party of the first part, for loss and damage, the result of the acts or omissions of its officers, agents, or employees, except when such loss or damage is the result of the negligence of the party of the first part, or of its officers, agents, or employees.

33 Third. The party of the second part shall do no business between any stations upon the railroad over which the right of trackage is given hereunder, or between any stations upon said railroad and stations upon the railroad of the New York, Lake Erie and Western Coal and Railroad Company.

This contract shall begin to run and become operative on the first day of January, 1883, or sooner, at the option of the party of the second part, upon written notice of such election, and shall continue for a period of five years, and until the expiration of one year's written notice thereafter given by either party of its desire to terminate the same.

In consideration of the grants and privileges herein given, the party of the second part agrees that during said period of five years, and until notice of termination shall have been given as aforesaid, it will not construct or be interested, directly or indirectly, in the construction or operation of any railroad parallel to or in competition with the railroad over which the trackage right is given hereunder.

It is expressly agreed that, in the event the party of the second part shall fail to comply with or perform any of the covenants or agreements hereinabove expressed to be kept and performed by it, that then and in that event the party of the first part may terminate this contract on sixty days' written notice.

All questions of difference or dispute between the parties hereto arising under this contract shall be submitted to three arbitrators,

two of whom shall be chosen by the parties respectively, and the third by the two so chosen, and the decision of said arbitrators, or of a majority of them, upon the question so submitted shall be binding upon the parties.

Witness the corporate seals of the parties hereto duly set and attested, the day and year first above written.

THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY,
By H. J. JEWETT, *President.*

Attest: A. R. MACDONOUGH, *Secretary.*

THE ROCHESTER AND PITTSBURGH RAILROAD COMPANY,
By WALSTON H. BROWN, *President.*

Attest: THOS. F. WENTWORTH, *Secretary.*

34 In consideration of the execution of the foregoing contract by the Rochester and Pittsburgh Railroad Company, and upon condition of the full and faithful performance by said company of the covenants and obligations therein undertaken to be kept and performed by it, the Buffalo, Bradford and Pittsburgh Railroad Company hereby consent to and confirm the same.

Witness the corporate seal of the Buffalo, Bradford and Pittsburgh Railroad Company hereto set and duly attested this — day of October, A. D. 1882.

THE BUFFALO, BRADFORD AND PITTSBURGH RAILROAD COMPANY,
By EDWARD CLYMER, *President.*

Attest: A. R. MACDONOUH, *Secretary.*

Endorsed: 141. Jan'y term, 1890. Commonwealth of Pennsylvania *vs.* New York, Lake Erie and Western R. R. Co. Agreement as to facts. Filed April 29, 1890. Exhibit No. 1. (S'g'd) Edgar L. King.

State Treasurer's Receipt.

EXECUTIVE DEPARTMENT,
TREASURY OF PENNSYLVANIA,
HARRISBURG, *Feb'y* 10, 1890.

Received from New York, Lake Erie and Western Railroad Company three hundred and forty-two dollars and eleven cents on account, to wit: tax on gross receipts for the six months ending June 30, 1889, $342.11.

(Signed) JOHN E. STOTT,
For W. LIVSEY,
State Treasurer.

Registered and countersigned.

(Signed) JAMES A. McALLISTER,
For THOMAS McCAMANT,
Auditor General.

35 *Stenographer's Notes.*

Dauphin County Court of Common Pleas, January Term, 1890.

COMMONWEALTH
vs.
NEW YORK, LAKE ERIE AND WESTERN RAILROAD CO. } No. 141. Gross Receipts.

Tried before the Honorable J. B. McPherson, additional law judge, Monday, March 31, 1890.

Appearances: Plaintiff, Hon. W. S. Kirkpatrick, attorney general; Hon. Jno. F. Sanderson, deputy attorney general. Defendant, M. E. Olmsted, Esq.

Recorded and transcribed in compliance with the provisions of the act of assembly of May 24, 1887.

(Signed) EDGAR L. KING,
Official Stenographer.

Stipulation for trial without a jury filed.

JOHN A. GLENN, called by plaintiff, sworn.

Examined by Mr. SANDERSON:

Q. Please produce the report and settlement in this case?

A. A settlement was made by the auditor general's department, approved by the State treasurer September 17, 1889, against this company, for tax on gross receipts for six months ending June 30, 1889, amounting to $935.41. This settlement was based upon a report filed by the company, which is herewith submitted.

By Mr. OLMSTED:

Q. You have the report in your hand?

A. I have.

Q. Do you know that on the margin of that report it is stated that $71,462.11 of the receipts therein returned were received from the Delaware and Hudson Canal Company, as rental for the use of the tracks of the Jefferson railroad, and $2,700 was received from the Buffalo, Rochester and Pittsburgh Railroad Company, as rental for the use of the tracks of the Buffalo, Bradford and Pittsburgh railroad?

A. Yes, sir; that appears upon the report.

Q. Will you state whether or not those two items were included in the amount of gross receipts upon which tax is charged in this settlement?

A. They are both included.

Agreement of facts filed. (Marked Exhibit No. 1.)

Argument.

Endorsed: 141. January Term, 1890. Commonwealth *vs.* New York, Lake Erie and Western Railroad Co. Stenographer's notes of testimony. Filed April 29, 1890.

36 *Opinion of the Court of Common Pleas.*

Dauphin C. P., January Term, 1890.

COMMONWEALTH *vs.* NEW YORK, LAKE ERIE AND WESTERN R. R. CO. } No. 141. Appeal from Accounting Officers.

By the COURT:

This case was tried without a jury, under the act of 1874. We find the facts to be as follows:

1. The defendant is a corporation of the State of New York, engaged in the business of transporting freight and passengers. Its railroad runs through the county of Susquehanna, in this State.

2. It leases and operates as one of its branches a railroad lying wholly within this State, known as the Jefferson branch, which extends from Carbondale to a connection with the defendant's main line in said county of Susquehanna. At Carbondale the Jefferson branch connects with the railroad of the Delaware and Hudson Canal Company, a corporation engaged in mining and transporting coal, and also in transporting freight and passengers.

3. The canal company makes use of the Jefferson branch in the manner, for the purposes, and upon the terms specified in an agreement made April 7, 1885. This agreement is made a part of this finding.

4. Under the eighth clause of said agreement, the canal company paid to the defendant for the transportation of coal and merchandise during the six months ending June 30, 1889, the sum of
37 $69,462.11. Of this amount, $69,100 was in respect of coal and merchandise transported by the canal company over the said Jefferson branch in transit to points in other States; the said coal and merchandise, when taken upon the cars and upon said Jefferson branch, being destined and intended for shipment by continuous transportation upon a single way bill, from points in Pennsylvania to points in other States, and having been actually so transported to, and delivered at, points in other States; and $362.11 was paid in respect of coal and merchandise taken up and put down within the State of Pennsylvania.

The canal company has paid to the State a tax upon its gross receipts for the transportation of the coal and merchandise in respect of which it paid to the defendant the said sum of $362.11.

5. Under the sixteenth clause of said agreement, the canal company paid to the defendant the sum of $2,000, of which $1,000 was made up of half fares collected from local passengers taken up and put down within the State of Pennsylvania, and $1,000 was in respect of passengers carried interstate by continuous transportation into, out of, or through the State of Pennsylvania.

6. The defendant also leases and operates, as one of its branches, a railroad known as the Buffalo, Bradford and Pittsburgh branch extending from Buttsville or Gilesville, Pa., to a connection with

defendant's main line at Carrollton, in the State of New York. At Crawford Junction, Pa., a point on this branch, the railroad of the Buffalo, Rochester & Pittsburgh Railway Company (formerly the Rochester & Pittsburg Railroad Company) connects with said branch. This last-mentioned corporation is engaged in the transportation of freight and passengers.

7. The Buffalo, Rochester and Pittsburg Railway Company makes use of part of the Buffalo, Bradford and Pittsburgh branch in the manner, for the purpose and upon the terms specified in an agreement made October 20, 1882, which agreement is made a part of this finding. The part used lies partly in this State and partly in the State of New York.*

38 8. Under this agreement, the amount paid to the defendant by the Buffalo, Rochester & Pittsburgh Railway Company, during the six months ending June 30, 1889, was $2,700, being one semi-annual payment.

For the same period the Buffalo, Rochester & Pittsburgh Railway Company paid to the State a tax upon its gross receipts, so far as the same were derived from transportation between points both of which are within the State of Pennsylvania.

9. This settlement taxes the entire gross receipts of the defendant from its business in Pennsylvania for the six months ending June 30, 1889, under section 7 of the act of 1879, and includes therein the sums paid by the canal company and by the Buffalo, Rochester & Pittsburgh Railway Company.

10. On February 10, 1890, the defendant paid to the State the whole amount demanded, except the tax upon said sums of $71,462.11 and $2,700.

Conclusions of Law.

The principal questions before us are these:

1st. Are the receipts derived by the defendant from the two companies named, taxable as "gross receipts for tolls and transportation?"

2nd. If so, does the tax offend in any degree against the uniformity clause of the Pennsylvania constitution, or the commerce clause of the Federal Constitution?

Two other questions are also involved, and will be afterwards briefly considered.

1. Section 7 of the revenue act of 1879, (P. L. 112,) declares "that every railroad company, canal company, &c., . . . owning, operating or leasing . . . any railroad, canal . . . or other device for transportation of freight or passengers, or in any way engaged in the business of transporting freight or passengers . . . shall pay a . . . tax of eight-tenths of one per centum upon the gross receipts of said company for tolls and transportation." Are the receipts in question embraced by this language? . . . Clearly, they are not receipts for "transportation" as that

*In ruling upon defendant's fourth exception the court finds as an addi- fact that this branch is used, under the agreement, for purposes of interstate transportation exclusively.

word is here used because the defendant does not itself carry these particular goods and passengers: but just as clearly they
39 must be said to be receipts for "tolls." This word has been defined by the supreme court of Pennsylvania, and we quote Mr. Justice Strong's definition in Boyle *v.* Philadelphia & Reading R. R. Co., 54 Pa., 314: "(Toll) is a tribute or custom paid for passage, not for carriage—always something taken for a liberty or privilege, not for a service; and such is the common understanding of the word. Nobody supposes that tolls taken by a turnpike or canal company include charges for transportation, or that they are anything more than an excise demanded and paid for the privilege of using the way." This definition was recognized in Cumberland Valley R. R. Co. App., 2 Pa., 228, and was expressly approved in Penna. R. R. Co. *v* Sly, 65 Pa., 205. Its terms include the payment made to the defendant under the two contracts above referred to, and determine that these payments are "tolls." Calling them "rentals" does not change their true nature as thus authoritatively defined.

As no argument was made by either party to this appeal, we do not know upon what grounds a tax upon such tolls is supposed to violate art. IX, sec. 1, of the Pennsylvania constitution, and, for the present at least, will content ourselves with simply overruling the objection.

The other objection, viz: the alleged violation of the commerce clause of the Federal Constitution, we also believe to be untenable. The tax before us is not laid upon receipts for transportation, either interstate or of any other kind, but on receipts for tolls, the sum paid by another corporation for the use of defendant's road; and we do not clearly see that this tax lays any unconstitutional burden upon commerce between the States. Indeed, it is rather the toll itself than the tax upon the toll which is the real burden, but as this is not imposed by the State, but by the voluntary act of the parties themselves, it furnishes no constitutional ground for complaint. As we look upon it, the situation is this: The defendant has a certain piece of railroad, wholly within the State of Pennsylvania, and, therefore, subject to its taxing power under certain limitations. This piece of railroad is used by another corporation, which pays to the defendant a stipulated price for such use. The State thereupon requires the defendant to pay a tax upon the price thus paid. Is this a burden upon the business done by the
40 corporation which pays the toll? If it be, it is so indirect that we do not believe it to be in violation of the commerce clause of the Federal Constitution.

It is certainly not a tax, direct or indirect, upon the toll-paying corporation, for the State demands nothing from it on this account; the demand is solely upon the toll-receiving corporation, and if it be a burden at all upon the toll-paying corporation it must be because the price which it may be asked to pay as such toll may be increased by reason of the tax imposed upon the receiving corporation. But the latter has no power of itself to shift the burden upon the other; this may of course be done by agreement; but the mak-

ing of such agreement is optional with the two corporations, and otherwise the tax lies where it first falls. It seems to us, therefore, that as the tax upon the toll does not, either by force of the statute itself or by the necessity of the case, reach the toll-paying corporation, it cannot be said to lay a burden upon the business done by that corporation. So far as this business is concerned between the States, no attempt is made to tax it, even when the State is dealing directly with the transporting corporation, and the tax in question is paid upon a different subject and upon a corporation which does not even aid in the transportation. It merely furnishes the road over which the transportation is done; it takes no active part in the business, and has no claim upon the shippers or passengers for any part of the money to be paid therefor.

Prima facie, the State may tax all of the defendant's receipts for toll received by a branch lying wholly in this State; and before an exemption as to any part thereof ought to be allowed upon the ground now taken, it should clearly appear that the tax would be a burden on interstate commerce as carried on by the defendant. This at least, it clearly is not—for the actual transportation is done, not by the defendant, but by another corporation for its own benefit—unless the defendant is to be considered as carrying on interstate commerce in respect of these particular goods and passengers, merely because it allows another corporation to use its road for such transportation and itself receives a stipulated price for such use. At the best this qualification is of doubtful soundness, and the
41 rule then is that "a case of simple doubt should be resolved favorably to the State law, leaving the correction of the error, if it be one, to the Federal judiciary . . . when convinced that the State law is really repugnant to the Federal Constitution, we must yield to the supreme authority of the latter." Com. *v.* Phila. & Read. R. R. Co., 62 Pa., 291.

The method by which the toll is to be computed and paid does not seem to us to be material. It may be fixed at a gross amount irrespective of the business done by the actual carrier, or it may be a specified sum per ton or per passenger. In either case it is payment for "trackage," as one of the agreements calls it; or a "toll," as the statute calls it, and if the transportation itself is not taxed or necessarily burdened by taxing the toll, it can make no difference whether the business done by the actual, untaxed carrier is interstate, or is wholly within the State; or how the payment is to be made.

3. Neither is there double taxation here. The canal company's receipts from interstate transportation are neither taxable nor taxed, and, therefore, as to toll paid in respect of them, the question of double taxation could not arise. Neither does it arise as to toll paid in respect of the canal company's receipts for transportation entirely within the State; for these receipts are taxable against it as receipts for "transportation," while the sum it pays to the defendant is taxable against the latter as receipts for "tolls." These are distinct subjects of taxation and not the same subject, are taxed in the hands of distinct and separate tax-payers, and therefore the

taxation is not double. In Penna. Co., &c., *v.* Com., 22 W. N., 340, it was held to be double taxation to tax the capital stock of a corporation and also the shares in the hands of individual stockholders; but this result was reached either by considering the capital stock and the shares as the same subject, or by considering the corporation and the collective shareholders as the same person. Here, in our opinion, there is not identity of subject, and there certainly is not identity of person.

4. The above remarks apply also to the toll paid by the Buffalo, Rochester and Pittsburgh Railway Company, with this difference only: that the toll paid by this company ought to be apportioned, and only so much should be taxed as represents the sum paid for the use of that part of the defendant's Buffalo, Bradford and Pittsburgh branch, which is within the State. This apportionment may be made by the mileage rule, if the sum cannot otherwise be accurately ascertained. We will leave a blank for the proper amount, which may be fil-ed by agreement.

42

Our conclusions are:

(1. The rentals paid to the defendant by the canal company and by the Buffalo, Rochester and Pittsburgh Railway Company are "receipts for tolls" within the meaning of section 7 of the act of 1879.)

(2. The taxation of such receipts does not offend against article IX, section 1, of the Pennsylvania constitution, or against the commerce clause of the Federal Constitution.)

(3. Such taxation is not, in the case before us, double taxation.)

4. The toll received by the defendant from the Buffalo, Rochester and Pittsburgh Railway Company should be apportioned, and only so much thereof be taxed as represents the sum paid for the use of that part of defendant's branch which lies within the State.

The sum due the Commonwealth is as follows:

Tax eight-tenth- of 1 per cent. upon $71,402.11, paid by the Del. & Hud. Can. Co.	$571 69
And upon $1,350 paid by the B., R. & P. R'y Co.	10 60
Int. at 12 per cent. from Nov. 16, 1889, to Apr. 29, 1890.	31 63
Attorney general's commission	29 11
Total	$643 03

for which amount we direct judgment to be entered, if exceptions are not filed according to law.

(Signed) JOHN B. McPHERSON, *A. L. J.*

43 *Defendant's Exceptions.*

In the Court of Common Pleas of Dauphin County, January Term, 1890.

COMMONWEALTH OF PENNSYLVANIA
vs.
NEW YORK, LAKE ERIE & WESTERN RAILROAD COMPANY. } No. 141.

This case having been tried by the court without a jury under the act of 1874, defendant files the following exceptions to the decision of the court:

1. The learned court erred in its first conclusion of law, as follows: "The rentals paid to the defendant by the canal company, and by the Buffalo, Rochester & Pittsburg Railway Company are 'receipts for tolls' within the meaning of sec. 7 of the act of 1879."

2. The learned court erred in its second conclusion of law, as follows: "The taxation of such receipts does not offend against art. IX of sec. 1 of the Pennsylvania constitution or against the commercial clause of the Federal Constitution."

3. The learned court erred in its third conclusion of law, as follows: "Such taxation is not, in the case before us, double taxation."

4. The learned court erred in not finding as a fact that, "that portion of defendant's railroad known as the Buffalo, Bradford & Pittsburg branch, extending from Buttsville or Gilesville, Pa., to a connection with defendant's main line at Carrollton, in the State of New York, as shown in finding of facts No. 6, is used by the Buffalo, Rochester & Pittsburg Railway Company for purposes of interstate transportation exclusively.

5. The learned court erred in not finding as a conclusion of law that the attempted taxation of the amount paid to defendant by the canal company, under the eighth clause of the agreement as set forth in finding of facts No. 4, particularly the item of $69,100 in respect of coal and merchandise transported by the canal company over the said Jefferson branch in transit to points in other States; the said coal and merchandise when taken upon the cars and upon said Jefferson branch being destined and intended for shipment by continuous transportation upon a single way bill from points
44 in Pennsylvania to points in other States, and having been actually so transported to, and delivered at points in other States, is in violation of that clause of section 8 of article I of the Constitution of the United States which provides that Congress shall have power "to regulate commerce with foreign nations and among the several States and with the Indian tribes."

6. The learned court erred in not finding as a conclusion of law that the taxation of $1 000 received by defendant from the canal company under the sixteenth clause of the agreement in respect of passengers carried interstate by continuous transportation into, out of, or through, the State of Pennsylvania, as shown in finding of facts No. 5, is in violation of that clause of section 8 of article

I of the Constitution of the United States which confers upon Congress the power "to regulate commerce with foreign nations and among the several States and with the Indians tribes."

7. The learned court erred in not finding, as a conclusion of law, that the taxation of the $2,700, received by defendant from the Buffalo, Rochester and Pittsburg Railway Company, for the use of its tracks, the said use being exclusively for purposes of interstate transportation of freight and passengers, is in violation of that clause of section 8, of article I, of the Constitution of the United States, which confers upon Congress the power "to regulate commerce with foreign nations and among the several States and with the Indian tribes."

8. The learned court erred in directing judgment to be entered in favor of the Commonwealth for $643.03.

9. The learned court erred in not directing judgment to be entered in favor of defendant.

NEW YORK, LAKE ERIE AND WESTERN RAILROAD CO.,

(Signed) By its attorney, M. E. OLMSTED.

Order of Court on Exceptions.

And now, to wit, May 27, 1890, the fact is found as requested in the fourth exception, but is immaterial. The other exceptions are overruled, and judgment directed to be entered in accordance with the opinion heretofore filed. To this ruling and to this judgment defendant excepts, and at its request exceptions are sealed.

(Signed) JOHN B. McPHERSON, *A. L. J.* [L. S.]

45 *Supreme Court of Pennsylvania Docket Entries.*

At a supreme court of the State of Pennsylvania sitting in and for the middle district of the said court, at the city of Harrisburg, Pennsylvania, on the 21st Monday following the first Monday of January, A. D. 1891.

Present: The Honorable Edward M. Paxson, chief justice; James P. Sterrett, Henry Green, Silas M. Clark, Henry W. Williams, James T. Mitchell, and J. Brewster McCollum, justices, and William Pearson, prothonotary, of said court.

Among the records of the said supreme court of Pennsylvania in and for the middle district, to May term, 1891, No. 7, it is contained as follows, to wit:

Docket Entries.

NEW YORK, LAKE ERIE & WESTERN RAILROAD COMPANY, Defendant Below,
vs.
COMMONWEALTH OF PENNSYLVANIA, Plaintiff Below.

Olmsted.

1890, June 11.—Precipe, appeal, affidavit, and recog. filed.
Eo die.—Exit writ of certiorari, r't'ble *sec. reg.*

1891, May 29.—Record returned and filed.
" June 1st.—Assignments of error filed.
" June 1st.—Argued.
1891, June 5th.—Judgment affirmed, *per curiam*.
1891, " —Petition for allocatur of writ of error from Supreme Court of the United States; allocatur of said writ by Hon. Joseph P. Bradley, justice of said court, and said writ of error received and filed; citation from said Hon. Joseph P. Bradley
46 and affidavit of service thereof to Jas. A. Stranahan, deputy attorney general for the Commonwealth of Pennsylvania, and writ of error bond in the sum of thirteen hundred dollars ($1,300.00) received and filed.
Certified from the record.

[Seal of the Supreme Court of Pennsylvania, Middle District, 1776.]

WILLIAM PEARSON,
Prothonotary.

47 *Precipe.*

In the Supreme Court of Pennsylvania for the Middle District.

COMMONWEALTH OF PENNSYLVANIA	Certiorari to the Court of Common Pleas for the County of Dauphin, of January Term, 1890. No. 141.
vs.	
NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY.	

Issue certiorari to the court of common pleas of the county of Dauphin to bring up record and proceedings in a certain action in said court, No. 141, January term, 1890, wherein The Commonwealth of Penna. is plaintiff and The N. Y., Lake Erie & Western R. R. Co. defendant, returnable to next term *sec. reg.*

M. E. OLMSTED,
Att'y for Def'd't.

To Wm. Pearson, proth'y sup. court, middle district.

48 *Precipe for Appeal.*

In the Supreme Court of Pennsylvania for the Middle District.

COMMONWEALTH OF PENNSYLVANIA, Plaintiff,	Court of Common Pleas of Dauphin County, January Term, 1890. No. 141.
vs.	
NEW YORK, LAKE ERIE AND WESTERN RAILROAD CO., Defendant.	

Enter appeal on behalf of defendant above named from a judgment of the court of common pleas of the county of Dauphin.

M. E. OLMSTED,
Att'y for Def't.

To Wm. Pearson, proth'y sup. c't, middle district.

Affidavit.

COUNTY OF DAUPHIN, *ss:*

M. E. Olmsted, being duly sworn, saith that the above appeal is not intended for delay.

M. E. OLMSTED.

Sworn and subscribed this 11th day June, A. D. 1890.

WM. PEARSON,
Prothonotary,
Per JOHN HARNER,
Dep'ty Prot'y.

49 *Recognizance.*

In the Supreme Court of Pennsylvania for the Middle District.

COMMONWEALTH OF PENNSYLVANIA	Appeal of Defendant from the Judgment of the Court of Common Pleas for the County of Dauphin, of January Term, 1890. No. 141.
vs.	
NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY.	

We, The New York, Lake Erie & Western Railroad Company, by *its* attorney-, M. E. Olmsted & A. C. Stamm, severally acknowledge to owe the above-named plaintiff the sum of one hundred dollars upon condition that the above-named defendant do not prosecute its appeal with effect; and if the said judgment be affirmed or the appeal be discontinued or nonprossed that said defendant will pay the cost adjudged or accruing upon such judgment and all other costs that may be awarded upon such appeal, or else we will do it for said defendant.

NEW YORK, LAKE ERIE &
WESTERN R. R. CO.,
By its attorney-, M. E. OLMSTED.
A. C. STAMM.

Taken and acknowledged this eleventh day of June, A. D. 1890.

WM. PEARSON,
Prothonotary,
Per JOHN HARNER,
Dep'ty Prot'y.

50 *Writ of Certiorari.*

MIDDLE DISTRICT OF PENNSYLVANIA, *sct:*

[Seal of the Supreme Court of Pennsylvania, Middle District.]

The Commonwealth of Pennsylvania to the justices of the court of common pleas for the county of Dauphin, Greeting:

We, being willing for certain causes to be certified of the appeal of the New York, Lake Erie & Western Railroad Company from the judgment of the court of common pleas of Dauphin county in a case wherein The Commonwealth of Pennsylvania is plaintiff and the said appellant is defendant, to No. 141, Jan. term, 1890, before

you or some of you depending, do command you that the record and proceedings aforesaid, with all things touching the same, before the justices of our supreme court, at a supreme court to be holden at Harrisburg, in and for the middle district of said Commonwealth, on the 21 Monday foll. 1 Mon. of Jan., 1891, being the 1st Monday of the term, so full and entire as in our court before you they remain, you certify and send, together with this writ, that we may further cause to be done thereupon what of right and according to our laws of the said State ought.

Witness the Hon. Edward M. Paxson, doctor of laws, chief justice of our supreme court, at Harrisburg, the 11th day of June, in the year of our Lord one thousand eight hundred and ninety, and of the Commonwealth the 114th.

WILLIAM PEARSON,
Prothonotary.

51 [Endorsed:] No. 7. May term, 1891. Supreme court, middle district. Commonwealth of Pennsylvania *vs.* New York, Lake Erie & Western R. R. Co., appellant. Certiorari sur-appeal to the court of common pleas for the county of Dauphin. Returnable the 21 Mon. foll. 1 Monday of Jan., 1891. "Rule on the appellee to appear and plead on the return day of the writ." N. B. 10 days' notice to the parties or their counsel below necessary to compel an appearance.

The record and process, with all things touching the same, so full and entire as before us they remain, to the honorable the judges of the supreme court of the Commonwealth of Pennsylvania, sitting in and for the middle district, we certify and send, as within we are commanded.

J. W. SIMONTON, *P. J.* [L. S.]

I certify that recognizance for costs in $100, with M. E. Olmsted and A. C. Stamm as bail, has been duly filed in the supreme court.

WILLIAM PEARSON,
Prothonotary.

Due service admitted.

JOHN F. SANDERSON,
Deputy Attorney General.

Filed in supreme court of Pennsylvania May 29, 1891.

52 *Assignments of Error.*

In the Middle District, Supreme Court of Pennsylvania, May Term, 1891.

COMMONWEALTH OF PENNSYLVANIA *vs.* NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY.	No. 7. Appeal of the New York, Lake Erie and Western Railroad Company.

1. The learned court erred in its first conclusion of law, as follows: "The rentals paid to the defendant by the canal company

and by the Buffalo, Rochester and Pittsburgh Railway Company are 'receipts for tolls' within the meaning of section 7 of the act of 1879."

2. The learned court erred in its second conclusion of law, as follows: "The taxation of such receipts does not offend against article IX, section 1, of the Pennsylvania constitution or against the commerce clause of the Federal Constitution."

3. The learned court erred in its third conclusion of law, as follows: "Such taxation is not, in the case before us, double taxation."

4. The learned court erred in overruling defendant's fifth exception, which exception was as follows:

"The learned court erred in not finding as a conclusion of law that the attempted taxation of the amount paid to the defendant by the canal company under the eighth clause of the agree-
53 ment as set forth in finding of facts No. 4, particularly the item of $69,100 in respect to coal and merchandise transported by the canal company over the said Jefferson branch in transit to points in other States, the said coal and merchandise when taken upon the cars and upon said Jefferson branch being destined and intended for shipment by continuous transportation upon a single way bill from points in Pennsylvania to points in other States, and having been actually so transported to, and delivered at, points in other States, is in violation of that clause of section 8 of article I of the Constitution of the United States, which provides that Congress shall have power to 'regulate commerce with foreign nations and among the several States, and with the Indian tribes.'"

5. The learned court erred in overruling defendant's sixth exception, which was as follows:

"The learned court erred in not finding as a conclusion of law that the taxation of $1,000 received by defendant from the canal company under the sixteenth clause of the agreement in respect to passengers carried interstate by continuous transportation into, out of, or through the State of Pennsylvania, as shown in finding of facts No. 5, is in violation of that clause of section 8 of article I of the Constitution of the United States, which confers upon Congress the power 'to regulate commerce with foreign nations and among the several States and with the Indian tribes.'"

6. The learned court erred in overruling the defendant's seventh exception, which was as follows:

"The learned court erred in not finding as a conclusion of law that the taxation of the $2,700 received by defendant from the Buffalo, Rochester & Pittsburgh Railway Company for the use of its tracks, the said use being exclusively for the purposes of interstate transportation of freight and passengers is in violation of that clause of section 8 of article I of the Constitution of the United States which confers upon Congress the power 'to regulate commerce with foreign nations and among the several States and with the Indian tribes.'"

7. The learned court erred in not sustaining the ninth objection specified in defendant's appeal, which was as follows:

"The New York, Lake Erie & Western Railroad Company,

having paid or proposing to pay into the State treasury the sum of $342.11, being the full tax at 8 mills upon the company's receipts from tolls and transportation and from express business, it is not indebted to the Commonwealth in any further sum, and the balance claimed in the settlement hereby appealed from is erroneously and illegally charged."

8. The learned court erred in directing judgment to be entered in favor of the Commonwealth for $643.03.

9. The learned court erred in not directing judgment to be entered in favor of defendant.

Harrisburg, Pa., May 4, 1891.

NEW YORK, LAKE ERIE & WESTERN RAILROAD COMPANY,

(Signed) By its attorney, M. E. OLMSTED.

54 *Opinion of Supreme Court.*

COMMONWEALTH OF PENNSYLVANIA *vs.* NEW YORK, LAKE ERIE & WESTERN R. R. Co., Appellant. } 7. May Term, 1891.

Per Curiam:

These cases were argued together. The opinion of the learned judge below in No. 7, of May term, covers substantially all the questions presented. We affirm the judgment in each case upon said opinion.

55 *Return to Writ of Error from Supreme Court of the United States.*

And now here, on this day, to wit, August 6th, 1891, the said The New York, Lake Erie & Western Railroad Company produced to the supreme court of Pennsylvania here the writ of the United States of America for the correcting of errors of and upon the said premises, commanding the record and proceedings aforesaid of the judgment aforesaid so as aforesaid rendered, with all things touching the same, to be transmitted to the Supreme Court of the United States, to be held at the city of Washington on the second Monday of October next, which writ of error is hereunto annexed.

In pursuance whereof and according to the form and effect of the act of Congress in such case made and provided a transcript of the record and proceedings of the judgment aforesaid so as aforesaid rendered, with all things relating to the same, together with the said writ of error, are hereby transmitted to the said Supreme Court of the United States accordingly.

56 To the Honorable Joseph P. Bradley, justice of the Supreme Court of the United States:

The petition of the New York, Lake Erie & Western Railroad Company respectfully showeth—

That your petitioner is a corporation created by and existing under the laws of the State of New York, owning and operating a

railroad extending from Jersey City, in the State of New Jersey, to Dunkirk, in the State of New York, a distance of about 428 miles, of which, in order to avoid engineering difficulties, about 42 miles were constructed within the counties of Susquehanna and Pike, in Pennsylvania, under authority conferred by certain legislation of said State, upon the condition of paying for the privilege $10,000 per annum into the State treasury and an annual tax upon an amount of capital stock of the company equal to the cost of the construction of that portion of its works in Penna., which annuity and tax have been regularly paid.

That the Pennsylvania statute of June 7, 1879 (P. L., 112), section 7, requires that every railroad and transportation company doing business in said Commonwealth "shall pay to the State treasurer for the use of the Commonwealth a tax of eight-tenths of one per centum upon the gross receipts of said company for tolls and transportation, telegraph business, or express business," the said tax to be paid semi-annually.

That the Delaware & Hudson Canal Company is also a corporation of the State of New York, owning an extensive system of railroads which extend into the State of Pennsylvania.

57 That your petitioner operates what is known as the Jefferson branch, extending from a connection with its main line in Susquehanna county to Carbondale, at which point it connects with the railroad of the Delaware & Hudson Canal Company.

That the Delaware & Hudson Canal Company is also engaged in mining and transporting anthracite coal, and that it acquired from your petitioner the right to use the said Jefferson branch for certain purposes jointly with your petitioner—that is to say, each party running its own trains over the said road. For the use of that branch for the transportation of freight the conditions for payment are thus set forth in the eighth clause of the agreement:

"The canal company shall pay to the railroad company trackage on the Jefferson branch of the New York, Lake Erie & Western railroad to the amount of one-fourth of one cent per ton per mile, but the total amount in any one year shall not be less than $120,000, and the same shall be payable monthly."

By the sixteenth clause of the said agreement it is provided that as to passenger business:

"The canal company shall pay to the railroad company one-half of the fares collected from such local passengers; and the canal company is to pay to the railroad company as compensation for other passengers one cent per mile per revenue passenger, except in case excursion trains are run, when the railroad company shall be paid one-half the gross fares per mile received from such passengers or such trains and one-half the revenue from express and mails, based on the earnings per train mile."

That your petitioner has also what is known as the Buffalo, Bradford and Pittsburgh branch, extending from Buttesville or Gilesville, Pa., to a connection with its main line at Carrollton, N. Y. At Crawford Junction, Pa., this branch connects with the railroad of the Buffalo, Rochester & Pittsburgh Railway Company, which latter

company, under agreement between the two, is authorized to
58 use a certain portion of this branch in consideration of the sum of $5,400 per annum, payable semi-annually. One-half of that portion of the branch thus used is in Pennsylvania and the other half is in New York.

That for the six months ending June 30, 1889, the auditor general and State treasurer of Pennsylvania settled an account against your petitioner for tax on gross receipts claimed to be due under the aforesaid seventh section of the act of June 7, 1879, embracing in said account an item of $69,462.11 received from the Delaware & Hudson Canal Company under the agreement aforesaid, and $2,700 received from the Buffalo, Rochester & Pittsburgh Railroad Company for the use of the Buffalo, Bradford & Pittsburgh branch.

That your petitioner paid into the State treasury all of the tax charged by the auditor general except that upon the two items above mentioned, as to which it entered an appeal to the court of common pleas of Dauphin county, averring in its appeal that the said receipts having been derived from interstate transportation their taxation was in violation of the commerce clause of the Constitution of the United States.

That by agreement of the parties the case was heard by the court without a jury, the court finding both the law and the facts.

That among the findings of fact of the trial court are the following:

"Under the eighth clause of said agreement the canal company paid to defendant for the transportation of coal and merchandise during the six months ending June 30, 1889, the sum of $69,462.11.
Of this amount $69,100 was in respect of coal and merchan-
59 dise transported by the canal company over the said Jefferson branch in transit to points in other States, the said coal and merchandise when taken upon the cars and upon said Jefferson branch being destined and intended for shipment by continuous transportation upon a single way bill from points in Pennsylvania to points in other States and having been actually so transported to and delivered at points in other States, and $362.11 was paid in respect of coal and merchandise taken up and put down within the State of Pennsylvania."

"The canal company has paid to the State a tax upon its gross receipts for the transportation of the coal and merchandise in respect of which it paid to the defendant the said sum of $362.11."

"Under the sixteenth clause of said agreement the canal company paid to the defendant the sum of $2,000, of which $1,000 was made up of half fares collected from local passengers taken up and put down within the State of Pennsylvania, and $1,000 was in respect of passengers carried interstate by continuous transportation into, out of, or through the State of Pennsylvania."

That the trial judge also found as a fact that that portion of the Buffalo, Bradford & Pittsburg branch used by the Buffalo, Rochester & Pittsburgh Railway Company lies partly in Pennsylvania and partly in New York and is used by the last-named company exclusively for interstate transportation.

That the court of common pleas of Dauphin county, having correctly found the facts as above stated, nevertheless found as its second conclusion of law that "the taxation of such receipts does not offend against art. IX, section 1, of the Pennsylvania constitution nor against the commerce clause of the Federal Constitution."

That your petitioner thereupon filed exceptions to the conclusions of the court, among which were the following:

"The learned court erred in not finding as a conclusion of law that the attempted taxation of the amount paid to defendant by the canal company under the eighth clause of the agreement, as set forth in finding of facts No. 4, particularly the item of $69,100 in respect of coal and merchandise transported by the canal
60 company over the said Jefferson branch in transit to points in other States, the said coal and merchandise when taken upon the cars and upon said Jefferson branch being destined and intended for shipment by continuous transportation upon a single way bill from points in Pennsylvania to points in other States and having been actually so transported to and delivered at points in other States, is in violation of that clause of section 8 of article I of the Constitution of the United States which provides that Congress shall have power 'to regulate commerce with foreign nations and among the several States and with the Indian tribes.'"

"The learned court erred in not finding as a conclusion of law that the taxation of $1,000 received by defendant from the canal company under the sixteenth clause of the agreement in respect of passengers carried interstate by continuous transportation into, out of, or through the State of Pennsylvania, as shown in finding of facts No. 5, is in violation of that clause of section 8 of article I of the Constitution of the United States which confers upon Congress the power 'to regulate commerce with foreign nations and among the several States and with the Indian tribes.'"

"The learned court erred in not finding as a conclusion of law that the taxation of the $2,700 received by defendant from the Buffalo, Rochester and Pitsburgh Railway Company for the use of its tracks, the said use being exclusively for purposes of interstate transportation of freight and passengers, is in violation of that clause of section 8 of article I of the Constitution of the United States which confers upon Congress the power 'to regulate commerce with foreign nations and among the several States and with the Indian tribes.'"

That the court of common pleas of Dauphin county overruled all of your petitioner's said exceptions, and upon the twenty-seventh day of May, 1890, judgment was entered in said court in favor of the Commonwealth of Pennsylvania and against your petitioner for $643.03 and costs.

That your petitioner appealed from the said judgment to the supreme court of Pennsylvania, assigning as errors, *inter alia*, the overruling of the aforesaid exceptions.

That the supreme court of Pennsylvania, refusing to sus-
61 tain your petitioner's said assignments of error, did upon the

5th day of June, A. D. 1891, affirm the judgment of the court of common pleas of Dauphin county.

That the supreme court of Pennsylvania, in which said case was heard and decided, is the highest court of record and the court of last resort in the Commonwealth of Pennsylvania.

That the judgment of said court is final.

That the judgment of said court, as already shown, has necessarily involved the decision of a Federal question, and that said decision is in favor of the State law and against the immunity claimed by your petitioner under the Constitution of the United States.

Wherefore your petitioner (presenting herewith a bond, with security, for approval) prays that a writ of error may be allowed to issue to said supreme court of Pennsylvania to bring up the record to the Supreme Court of the United States for correction in that which violates the Constitution and laws thereof, and that the citation to the defendant may accompany the same; and it will ever pray, &c.

Harrisburg, Pa., July 7, 1891.

NEW YORK, LAKE ERIE & WESTERN RAILROAD COMPANY,
By its attorney, M. E. OLMSTED.

Presented to me & allowed July 22d, 1891.

JOSEPH P. BRADLEY,
Asso. Justice Sup. C't U. S.

62 [Endorsed:] In U. S. Supreme Court. New York, Lake Erie & Western Railroad Co. (plaintiff in error) *vs.* Commonwealth of Pennsylvania. Petition for writ of error. M. E. Olmsted. Filed in supreme court, middle district, Aug. 6, 1891.

63 Know all men by these presents that we, the New York, Lake Erie & Western Railroad Company and William H. Metzger and A. C. Stamm, of the city of Harrisburg, State of Pennsylvania, are held and firmly bound unto the Commonwealth of Pennsylvania in the full and just sum of thirteen hundred dollars ($1,300), to be paid to the said Commonwealth of Pennsylvania or her certain attorney or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, by these presents.

Sealed with our seals and dated this sixteenth day of July, in the year of our Lord one thousand eight hundred and ninety-one.

Whereas lately, at a court of common pleas in and for the county of Dauphin, State of Pennsylvania, in a suit depending in said court between the Commonwealth of Pennsylvania and the New York, Lake Erie & Western Railroad Company, in which judgment was rendered against the said New York, Lake Erie & Western Railroad Company, which judgment was afterwards affirmed by the supreme court of Pennsylvania in a suit in said court, of May term, 1891, No. 7, in the middle district of said court, and the said New York, Lake Erie & Western Railroad Company having ob-

tained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Commonwealth of Pennsylvania, citing and admonishing her to be and appear at a Supreme Court
64 of the United States to be holden at Washington within thirty days from the date of said writ of error:

Now, the condition of the above obligation is such that if the said New York, Lake Erie & Western Railroad Company shall prosecute its writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

NEW YORK, LAKE ERIE & WESTERN RAILROAD COMPANY.
(Signed) JOHN KING, *President.*
Attest:
[SEAL.] A. R. MACDONOUGH, *Secretary.*
(Signed) W. H. METZGER.
" A. C. STAMM.

Signed, sealed, and delivered in presence of—
(Signed) A. J. SMALLWOOD.
" RUSSELL P. BUTLER.
Approved by—
(Signed) JOSEPH P. BRADLEY,
Asso. Justice Sup. Court U. S.

UNITED STATES OF AMERICA, } ss:
Litchfield, Connecticut, }

Alexander C. Stamm maketh oath and saith that he is worth thirty-five hundred dollars after all his debts are paid, and that he knows William H. Metzger, the other surety in the foregoing bond, and believes him to be worth fifteen thousand dollars after all his debts are paid.
(Signed) A. C. STAMM.

Sworn and subscribed before me July 22, 1891.
(Signed) JOSEPH P. BRADLEY,
Asso. Justice Sup. C't U. S.

[Endorsed:] Copy. In U. S. Supreme Court. New York, Lake Erie & Western Railroad Company (plaintiff in error) *vs.* Commonwealth of Pennsylvania. Bond. Filed in supreme court, middle district, Aug. 6, 1891.

65 *Certificate.*

STATE OF PENNSYLVANIA, } ss:
County of Dauphin, }

In testimony that the foregoing, contained on pages one to 62, inclusive, is a full, true, and correct copy of the record and proceedings of the supreme court of the State of Pennsylvania, the highest

court of law and equity in that State, in the case lately depending therein, to No. —, May term, A. D. 1891, wherein The New York, Lake Erie & Western Railroad Company was appellant and The Commonwealth of Pennsylvania was appellee, I have hereunto subscribed my name and affixed the seal of the said supreme court, at Harrisburg, this 6th day of August, A. D. 1891.

[Seal of the Supreme Court of Pennsylvania, Middle District, 1776.]

WILLIAM PEARSON,
Prothonotary of the Middle District of the Supreme Court of Pennsylvania.

Endorsed on cover: Case No. 14,799. Pennsylvania supreme court. No. 263. The New York, Lake Erie & Western Railroad Company, plaintiff in error, *vs.* The Commonwealth of Pennsylvania. Filed August 13, 1891.